

2006

# Alan D. Arnold v. Kara H. Arnold : Petition for Rehearing

Utah Court of Appeals

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C. Richard Henriksen Jr.; attorney for appellee.

Alan D. Arnold; pro se.

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**IN THE UTAH COURT OF APPEALS**

**STATE OF UTAH**

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ALAN D. ARNOLD,	:	
	)	<b>PETITION FOR REHEARING</b>
Petitioner / Appellant,	:	
	)	
v.	:	Appellate Court No. 20060862
	)	
KARA H. ARNOLD	:	
	)	District Court No. 984901956
Respondent / Appellee.	:	

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APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT IN  
AND FOR WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH  
JUDGE ROGER S. DUTSON

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	)	<b>PETITION FOR REHEARING</b>
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## **Introduction**

Comes Now, the Appellant, Pro Se, and respectfully submits this PETITION FOR REHEARING pursuant to Rule 35 of the Utah Rules of Appellate Procedure in an effort to bring points of law and facts to the attention of this court that have been overlooked and or misapprehended in the opinion released on January 17, 2008. The Utah Court of Appeals has continuing jurisdiction in the matter pursuant to Section 78-2a-3 (2)(h) Utah Code Ann., as amended. The Appellant certifies that this petition is presented in good faith and not to delay.

The opinion released, January 17, 2008, neglects many of the facts and several issues brought forth in the brief of the Appellant. A denial of this motion for rehearing would be a continuation of the misapplication of law, abuse of discretion on behalf of the District Court, and disregard for the facts in this case.

## **Argument**

The Appellant filed a Petition to Modify the Decree of Divorce in April of 2005 alleging a substantial and material change in circumstances with **two** primary grounds that: 1) the Respondent earns significantly more money than she did at the time of the mediated “Memorandum of Understanding” and 2) that the Petitioner earns significantly less money than he did at the time of the mediated “Memorandum of Understanding”.

The Appellant filed an appeal before this court challenging the lower court findings as they do not address the material issues brought forth in the petition to modify

the decree of divorce. The district court's ruling states that the Petitioner has failed to meet his burden of proof on all issues and that there are no merit to his claims. However, the question before the lower court was "were the changes in the parties income at such a level to meet the statutory threshold requirements in a substantial material change in circumstance?".

The question brought before the higher court was "Whether the Appellant provided the information required by statute necessary in establishing the threshold of a substantial material change in circumstances has occurred and that the change was not contemplated at the time the decree was enter or at the time of the 2003 mediation? If so, did the trial court abuse its discretion in not following the requirements of law?".

The trial court has an obligation of law as stated in U.C.A. 78-45-7.2 to determine whether [or not] a substantial material change is circumstances has occurred. The threshold to establish a substantial and material change in circumstances addressing this allegation is material changes of 30% or more in the income of a parent as stated within U.C.A. 78-45-7.2 (9)(b)(iii). U.C.A. 78-45-7.2 (9)(c) provides direction to the Court that "Upon receiving a petition under Subsection (9)(a), which gives a parent the right to petition the court to adjust the amount of child support if there has been a substantial change in circumstances, the court **shall**, taking into account the best interests of the child, determine whether a substantial change in circumstance has occurred.

In addressing the first primary material issue brought forth in the Petitioner's

Petition, the district court found that the gross income of the petitioner's was \$8,000.00 per month in 2005 by averaging the \$14,500.00 the petitioner made in the first three months of 2005 and the \$5,833.33 that the petitioner earned in the last nine months of 2005. The averaged amount of \$8,000.00 is a 45% decrease in the petitioner's income from the original amount in the child support calculation of \$16,700.00. This decrease in gross income led the district court to find that the petitioner is "voluntarily underemployed" even though the petitioner remains at the same company in the same job he has held for the prior nine years. In addition to the decrease in pay, the district court supported its finding of "voluntarily underemployed" with the past earnings of the petitioner and the fact that the petitioner attends school.

The finding of "voluntarily underemployed" would suggest that the district court found that the petitioner's gross income had in fact changed. The lower court stated that the petitioner's adjusted gross income of \$3,500.00 per month listed on the new child support calculation after the subtraction of business related expenses and an additional child in the petitioner's home as detailed by statute was not credible.

How is it possible that the petitioner failed to meet his burden of proof on all issues and have no merit to his claims in seeking a substantial material change in circumstances, when the trial court uses all the above income information to support its finding of "voluntary underemployment"? The district court does in fact have a statutory basis on which to determine an imputed income but failed to use it in this case. While the

district court used past earnings to establish earning capacity, there is no evidence suggesting that the petitioner could maintain the same gross income in future probable earnings nor was evidence admitted in regards to the incomes of individuals with similar training and backgrounds or data from the Department of Workforce Services (U.C.A. 78-45-7.5). Therefore there is no basis for the district court to determine whether the income from the past was an underemployment or over-employment situation.

The second argument in the Petition for Rehearing addresses “whether the court erred in its finding that the Appellee has not misrepresented her income at the time of the mediation and enforced agreement of 2003?”. There is no challenge before the higher court that the district court found that the respondent had not misrepresented her income. The challenge before the higher court is that the district court’s finding was that the respondent had not misrepresented her income when the material issue brought before the district court was “whether [or not] the respondent’s income had increased by the 30% or more required to achieve the threshold for a substantial material change in circumstance?”. The district court erred by making a finding that which was not before the court and failed to make any findings regarding the material issue that was brought before it by petition.

The Court of Appeals should rehear this challenge to the district court’s findings, reverse the finding that the respondent has not misrepresented her income, and remand the issue to the district court to enter findings about the adjusted gross income of the

respondent and its effect upon the possible substantial and material change in circumstances to determine whether the statutory threshold has been met.

In seeking a modification based on a substantial and material change in circumstances, the Appellant would have to achieve the threshold of material changes of 30% or more in the income of a parent which in accordance with the petition filed in April of 2005, **could be either parent but need not be both parents.**

The Appellee's adjusted gross monthly income in the calculation of the 2003 child support amount was \$2,000.00. The Appellee had an adjusted gross monthly income of over \$6,900.00 in 2004 which is an increase of 345%. The Appellee had an adjusted gross monthly income of over \$6,100 in 2005 which is an increase of 305%. This evidence presented in Petitioner's Exhibit #19 using the Appellee's tax returns exceeds the required threshold by ten times of the second primary issue of the petition filed by the district court. The trial court must make findings on all material issues; failure to do so constitutes reversible error. *Andersen v. Andersen*, 757 P.2d 476, 478 (Utah App. 1988). The trial court failed to make any findings regarding this material issue as brought forth in the Appellant's Petition to Modify the Decree of Divorce.

### **Standards of Review**

The Court of Appeals, through its opinion of this matter incorrectly applies the standard of review stating "We review the district court's "[factual] findings for clear error and its conclusions of law for correctness, affording the court some discretion in



applying the law to the facts.”” Olsen v. Olsen, 2007 UT App 296, 7, 169 P.3d 765 (quoting E.B. v. State, 2002 UT App 270, 11, 53 P.3d 963). This standard of review does not apply. In E.B. v. State, 53 P.3d 963 Utah App., 2002, it states that: “In termination of parental rights cases, appellate court reviews the juvenile court’s findings for clear error and its conclusions of law for correctness, affording the court some discretion in applying the law to the facts. This case does not involve the termination of parental rights nor does is it before the juvenile court. Therefore it would be inappropriate to apply this standard to this case as it would make the district court’s discretion overly broad.

The Court of Appeals also stated in paragraph 7 that: “the district court also noted that any actual decrease in petitioner’s income resulted for his voluntary return to school, a circumstance that will not ordinarily justify a reduction in child support. See Hill v. Hill, 869 P.2d 963, 965 (Utah Ct. App. 1994) (affirming imputation of income where parent left existing career to pursue further education. The application of the Hill case does not apply as the petitioner did not leave his existing career for the reason of education or any other reason. The petitioner has held the same job at the same company for nine years prior to the reduction in pay and an additional two years after the reduction in pay.

The correct standards of Review are:

- 1) The trial court must make findings on all material issues; failure to do so constitutes reversible error. Andersen v. Andersen, 757 P.2d 476, 478 (Utah App. 1988).

2) The Court of Appeals will not disturb the district court's actions in a child support proceeding unless the court exceeded the limits of its permitted discretion; however, it reviews the district court's decision for correctness to the extent it involves questions of statutory interpretation. Diener v. Diener, 98P.3d 1178 UT App., 2004).

3) The trial court is required to follow statute and allow a modification if a party was able to demonstrate that a substantial material change in circumstances has accrued between the entry of the divorce decree and the filing of the modification petition. Diener v. Diener, 98P.3d 1178 UT App., 2004).

4) The party seeking the modification of child support has the burden of showing a substantial change in circumstances; it is insufficient to show that there has been some change, without showing that such a change was substantial. Diener v. Diener, 98P.3d 1178 UT App., 2004).

5) The findings articulated by the trial court following a motion to modify child support should be more than cursory statements; they must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. Diener v. Diener, 98P.3d 1178 UT App., 2004).

6) The determination of the trial court that there [has or has not] been a substantial change in circumstances... is presumed valid, “ and we review the ruling under the abuse of discretion standard.” Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985).

### **Issue of Integrity**

The Court of Appeals states in its published opinion within paragraph 3 that the Appellant/petitioner has been found in contempt of court. This statement is not true as the Appellant has never been held in contempt of court in any court for any reason. This statement is a reflection of the Appellant's character and should be removed. Whether or not this court grants the rehearing of this issue, the Appellant requests that the published opinion of this court be amended to correct this error.

### **Conclusion**

The petitioner entered evidence at trial in Utah's Second District Court of the past and current incomes of both parties as the primary material issues in seeking a determination of a substantial material change in circumstances. Child support was calculated in 2003 with the income of the respondent at \$2,000.00 per month and \$16,700.00. In April, 2005 the petitioner filed a modification petition due to a reduction in pay. The petitioner's new monthly pay rate was \$5,833.33 or \$70,000.00 per year. In the calculation of the adjusted gross income by subtracting business expenses and an amount for a child in the petitioner's home, the adjusted gross income was \$3,500.00. In discovery, the respondent's tax returns showed an increase in income of over 300% in 2004 and 2005.

The material issues in this case are whether a substantial material change in circumstances has occurred. The basis supporting this change through the modification

petition was a decrease in the petitioner's income and an increase in the respondent's income. Both of these material issues were shown at trial through admitted evidence to easily meet the statutory threshold for a substantial and material change in circumstances.

The district court entered a number of findings but none were made toward the three distinct questions put before the court. The trial court must make findings on all material issues; failure to do so constitutes reversible error. *Andersen v. Andersen*, 757 P.2d 476, 478 (Utah App. 1988).

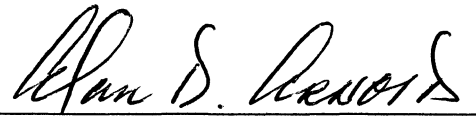
Therefore, based on the foregoing, the Utah State Court of Appeals should grant the Appellant's Petition to rehear this challenge to the district court findings and respectfully prays for relief as follows:

1. Reverse the district court's finding that the Petitioner has failed to meet his burden of proof on all issues.
2. Remand the issue of whether [or not] a substantial and material change in circumstances has occurred due to a material change in the income of 30% or more of either parent.
3. Reverse the district court's finding that the Respondent had not misrepresented her income and remand this issue to the district court to enter the necessary findings of whether [or not] the Respondent's income has changed to the point meeting the threshold of a substantial and material change of circumstances according to statute.

4. Reverse the district court's finding that the Petitioner in voluntarily underemployed and remand this issue to the district court for further proceeding at which time the finding may be reentered with adequate supporting findings.

5. A release of an opinion from the Court of Appeals that is free from incorrect statements about the Appellant ever being found in contempt of court.

Dated this 5<sup>th</sup> day of February, 2008.



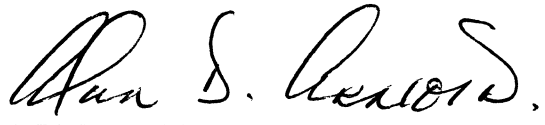
Alan D. Arnold, Petitioner

Served upon:

C. Richard Henriksen  
Henriksen & Henriksen  
320 South 500 East  
Salt Lake City, Utah 84102

**Certificate of Service**

I hereby certify that two copies of the foregoing Petition for Rehearing was hand delivered to the above address of C. Richard Henriksen, attorney for the respondent/Appellee on the 5<sup>th</sup> day of February, 2008.



# EXHIBIT “A”

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p. 1

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IN AND FOR THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH

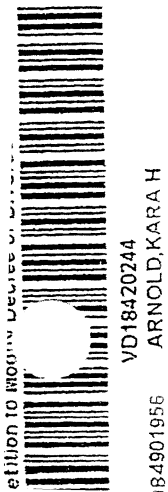
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ALAN D. ARNOLD,	:	PETITION TO MODIFY
	)	DECREE OF DIVORCE
Petitioner,	:	
	)	
	:	
v.	)	
	:	
KARA H. ARNOLD	)	Civil No. 984901956
	:	Judge Baldwin
	)	
Respondent.	:	

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COMES NOW, the Petitioner, respectfully submits this Petition to Modify the Decree of Divorce entered into on December 3, 1998, in the Second Judicial District Court of Weber County, State of Utah which was Modified through a "Memorandum of Understanding" entered into on September 22, 2003. The Petitioner alleges that since the date of the Modification through the "Memorandum of Understanding", there have been substantial material change in the circumstances of the parties, necessitating the modification of the Decree of Divorce as set forth below. The Petitioner alleges as follows:

1 The parties were initially granted a Decree of Divorce on or about



December 3, 1998, by the Second Judicial District Court of Weber County, State of Utah. (See Decree of Divorce, attached hereto as Exhibit "A")

2 The parties participated in a mediation session where a "Memorandum of Understanding" was agreed to and signed. (See "Memorandum of Understanding", attached hereto as Exhibit "B")

3. Subsequent to the entry of the Decree of Divorce and Modification using the "Memorandum of Understanding", the circumstances of the parties have changed in a substantial and material way, as follows:

- a. The Respondent earns significantly more money than she claimed at the time of the mediated "Memorandum of Understanding".
- b. The Petitioner earns significantly less money than was reported at the time of the mediated "Memorandum of Understanding".
- c. The Petitioner has shouldered the major portion of the care for the minor child according to the Uniform Child Support Guidelines.

4. The above listed facts constitute a material change in the circumstances of the parties, which changes necessitate a modification of the Order, as follows:

- a. That the child support should now be modified based upon the parties incomes and statutory guidelines set forth in the Uniform Child Support Guidelines for the minor child. This support should be effective from that time of service of this petition so long as the reported incomes were correct at the time of mediation on September 22, 2003.
- b. That the Petitioner be awarded the annual tax deduction for the



parties minor child from the year 2005 forward.

- c. That the agreement to pay one half of the tuition and fees for the Christian Heritage School be removed from mandatory status.
- d. That both the Respondent and Petitioner carry medical, dental, vision, and orthodontic insurance for the minor child so long as it is available at a reasonable price. If it is not available at a reasonable price, the party not carrying the required insurance reimburse the carrying party for one half of the minor child's out of pocket portion of the insurance premiums.
- e. That the Summertime overnights/School Break time overnights/ Non-holiday break time over nights be split evenly to create Parent Time over nights in place of weeks of summer Parent Time.

5. All other provisions of the Decree of Divorce and modifications in the "Memorandum of Understanding", not specifically modified herein, shall remain unchanged.

WHEREFORE, based on the foregoing, the Petitioner respectfully prays for the relief as follows:

- 1. For an Order modifying the provisions of the Decree of Divorce and "Memorandum of Understanding", based on the terms and conditions set forth above.
- 2. For such other and further relief as the court deems just and equitable in the premises.

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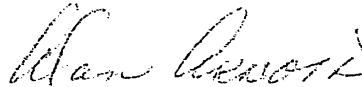
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Dated this 22 day of April, 2005.



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Alan Arnold  
Petitioner

Petitioner's Address:

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